

Message Text

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ACTION EUR-12

INFO OCT-01 ISO-00 MCT-02 SS-15 SSO-00 NSCE-00 SP-02
L-03 CIAE-00 INR-10 NSAE-00 INRE-00 EB-08 FAA-00
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O R 121455Z SEP 78
FM AMEMBASSY BONN
TO SECSTATE WASHDC IMMEDIATE 1785
USMISSION USBERLIN IMMEDIATE
INFO AMEMBASSY BERLIN
AMEMBASSY LONDON
AMEMBASSY MOSCOW
AMEMBASSY PARIS
USMISSION USNATO

C O N F I D E N T I A L SECTION 01 OF 02 BONN 16651

E.O. 11652: XGDS-1
TAGS: PEPR BQG EAIR PINS
SUBJECT: UK RESPONSE TO US POSITION ON HIJACKING IN BERLIN..

REFS: (A) USBER 2165; (B) BONN 16396; (C) BONN 16270;
(D) STATE 225179; (E) STATE 225624

SUMMARY. THE BRITISH HAVE PROVIDED US AS A NON-PAPER
THE FCO'S COMMENTS ON THE POINTS MADE IN THE US
PRESENTATION OF SEPTEMBER 6 IN THE BONN GROUP.
THE BRITISH ARGUMENTS CONTAIN NOTHING SURPRISING OR NEW.
THE MAIN BRITISH CONCERN CONTINUES TO BE THE EFFECT OF
A GERMAN TRIAL ON THE BONN DECLARATION SINCE THE BRITISH
BELIEVE THAT A US TRIAL WOULD GIVE THE APPEARANCE OF A
MORE EFFECTIVE PROSECUTION AND ONE LESS LIKELY TO BE
INFLUENCED BY POLITICAL CONSIDERATIONS. END SUMMARY.

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TRIAL BY US COURT

1. US ASSUMPTION OF JURISDICTION WOULD NOT
DETRACT FROM THE PRINCIPLE OF DELEGATED RESPONSIBILITY
FOR THE FRG TO REPRESENT BERLIN INTERESTS ABROAD OR CAST

DOUBT ON THE PROPRIETY OF EXTENSION OF FRG LEGISLATION TO BERLIN SUBJECT TO ALLIED RIGHTS AND RESPONSIBILITIES. ON THE CONTRARY THE US COULD MORE READILY SUPPORT THESE DELEGATIONS OF RESPONSIBILITY AND DEFEND THEM TO THE RUSSIANS BY MAKING CLEAR, IN AN APPROPRIATE CASE, THAT THEY ARE INDEED DELEGATIONS AND THAT THE ALLIES RETAIN THE SUPREME AUTHORITY AND RESPONSIBILITY. MOREOVER THE AMERICAN ARGUMENT RINGS RATHER HOLLOW WHEN THE FRG THEMSELVES ARE URGING THEM TO EXERCISE THEIR RESIDUAL POWERS.

2. AS THE FRENCH HAVE ARGUED, WHEN THE ALLIES REPLIED TO THE RUSSIANS' PROTEST ABOUT THE EXTENSION OF THE CONVENTION WE REFERRED TO THE RESERVATIONS WE MADE WHEN PERMITTING IT. TO EXERCISE THOSE RESERVED RIGHTS SHOWS THAT THE RESERVATIONS ARE NOT MERELY HOT AIR AS THE RUSSIANS ALLEGE.

3. WE DO NOT UNDERESTIMATE THE PRACTICAL DIFFICULTIES IN SETTING UP A SPECIAL COURT. BUT THE UK OVERCAME THEM IN THE WEIL CASE AND WE ARE SURE THE AMERICANS CAN DO SO ALSO, AND WITHOUT UNDUE DELAY. IN ANY CASE THE REQUIREMENT OF THE HAGUE CONVENTION AND THE BONN DECLARATION IS FOR EFFECTIVE NOT NECESSARILY SPEEDY PROSECUTION (AND GERMAN COURTS ARE NOT NOTED FOR SPEEDY PROCESS). WE ACCEPT THAT THERE WILL BE LEGAL

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UNCERTAINTIES. IN THE WEIL CASE THE DEFENSE DID NOT EFFECTIVELY EXPLOIT THEM; THE US CANNOT COUNT ON BEING SO LUCKY AGAIN. NONETHELESS THE UNCERTAINTIES FACED AT PRESENT APPEAR TO BE LESS SERIOUS THAN THOSE FACED BY A GERMAN PROSECUTION.

TRIAL BY GERMAN COURT

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C O N F I D E N T I A L SECTION 02 OF 02 BONN 16651

1. NONE OF THE OTHER MEMBERS OF THE BONN GROUP
HAS EVER DENIED THAT A GERMAN TRIAL WOULD BE IN
ACCORDANCE WITH THE HAGUE CONVENTION. SPECIFIC
INSTRUCTIONS TO THE GERMAN COURT WOULD BE OBVIOUSLY
COSMETIC AND IN OUR JUDGMENT WOULD NOT HELP MUCH.

QUESTION OF LENIENCY AND BONN DECLARATION

1. THE POINT IS WELL TAKEN ABOUT THE INDEPENDENCE
OF THE JUDICIARY. BUT IN THE GERMAN SYSTEM, AS WE
UNDERSTAND IT, THERE MIGHT BE FACTORS NOT ONLY
"IN MITIGATION" BUT "IN EXCULPATION." WE BELIEVE THAT
THE US LEGAL SYSTEM IS NEARER OURS ON THIS POINT THAN
TO THE GERMANS, AND HENCE LESS LIKELY TO ACQUIT
ALTOGETHER.

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2. WE TOO ARE IN NO DOUBT ABOUT THE FEDERAL
GOVERNMENT'S RESOLVE TO GIVE FORCE TO THE BONN
DECLARATION. BUT THEY HAVE PUT US ON NOTICE THAT THEY
ARE NOT SURE THAT THE INDEPENDENT GERMAN COURT IN
THESE PARTICULAR CIRCUMSTANCES WOULD PRODUCE A VERDICT
THAT WOULD SEEM TO THE WORLD TO BE IN ACCORDANCE WITH
THE SPIRIT OF THE BONN DECLARATION. NEITHER THE
CONVENTION NOR THE DECLARATION OBLIGE ANY STATE PARTY
TO SECURE A CONVICTION OR A SEVERE SENTENCE IN EVERY
CASE. BUT THE PROSECUTION SHOULD NOT BE SUCH AS TO
APPEAR INEFFECTIVE FROM THE OUTSET, OR FOR POLITICAL
REASONS.

ALLIED RIGHTS AND RESPONSIBILITIES

1. WE AND THE FRENCH HAVE INTERPRETED THE REFERENCE IN BK/L(73)28 TO AK LAW NO. 7 AS A DELIBERATE RESERVATION BY THE ALLIES, WHEN PERMITTING THE EXTENSION OF THE ENABLING LEGISLATION, OF THE POSSIBILITY OF PROSECUTION IN AN ALLIED COURT. WE UNDERSTAND THE US ARE LESS SURE THAT THIS WAS DELIBERATE BUT ACCEPT THAT IT IS THE EFFECT. IT WOULD BE HELPFUL TO KNOW IF THE US CONSIDER THERE IS ANY DOUBT WHETHER AND HOW FAR THIS CASE CAN BE BROUGHT WITHIN THE FRAMEWORK OF LAW NO. 7.

EASTERN REACTION

1. IT IS FOR THE GERMANS TO SAY SO, BUT WE BELIEVE IT UNLIKELY THAT THEY WOULD WELCOME AN ALLIED RESERVATION ON EXTRADITION IF THEY WERE TO TRY THE CASE. IN ANY CASE RESERVATION FOR US DECISION OF THAT QUESTION OR THAT OF NOTIFICATION TO ICAO WOULD NOT BLUNT CONFIDENTIAL

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ADVERSE RUSSIAN REACTIONS.

END TEXT

ACTION REQUESTED: USBER'S VIEWS ON AND THE DEPARTMENT'S ANSWERS TO THE QUESTION RAISED UNDER "ALLIED RIGHTS AND RESPONSIBILITIES" SUPRA, TO BE USED TO RESPOND TO THE UK.
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